

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

FEB - 9 2016

FRANKLYN DEVON PRILLERMAN

Plaintiff

CIVIL ACTION NO.

v.

13-1414

CITY OF PHILADELPHIA, ET AL.,

JURY TRIAL DEMANDED

Defendant

MICHAEL E. KUNZ, Clerk  
By \_\_\_\_\_ Dep. Clerk

RESPONSE TO AFFIRMATIVE DEFENSES OF CITY OF PHILADELPHIA NON-PRO TUNC

**1. Defendant asserts the Plaintiff's claims, in whole or in part, fail to state a claim upon which relief can be granted.**

Answer: Section 1983 provides a cause of action against persons acting under color of law who have violated rights guaranteed by the Constitution. See *Buckley v. City of Reading*, 66 F.3d 188, 190 (9<sup>th</sup> Circuit, 1995); *Demsey v. Kupperman*, 755 F.2d 1139, 1146 (9<sup>th</sup> Cir. 1984). Punitive damages are available under Section 1983. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1,17 (1991); *Kentucky v. Graham*, 473 U.S. 159,167 n.13 (1985); *Dang v. Cross*, 422 F.3d 800, 807 (9<sup>th</sup> Cir. 2005); Punitive damages are available even when the plaintiff is unable to show compensable injury. See *Smith v. Wade*, 461 U.S. 30, 55 n.21 (1983); *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1120 (9<sup>th</sup> Cir 2008)

**2. Defendant asserts the Plaintiff's claims are barred by the doctrine of qualified immunity because, at all times material hereto, the Defendant was carrying out his duties in a proper and lawful manner and in exercise of good faith**

Answer: The Eleventh Amendment does not bar actions against cities and counties. See *Greater LA Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9<sup>th</sup> Cir 1987); *Mondell v. Dept of Social Services.*, 436 U.S. 658, 690 n.54 (1978)*Holtz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1180(9<sup>th</sup> Cir 2003)

**3. Defendant asserts the Plaintiff's claims are barred , in part or in whole, by his failure to comply with the provisions of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. section 1997e(a), including but not limited to, the provision requiring exhaustion of all administrative remedies before commencing a federal suit.**

Answer: Plaintiff did file a formal grievance stating his claims on 1/13/13 in accordance with procedures detailed in "inmate handbook". However, Plaintiff was transferred from the facility on same day of 1/13/13. The defendant's knew Plaintiff's whereabouts and could have responded to Plaintiff's grievance, but failed to do so. It was impossible for Plaintiff to appeal a non-response on the part of the Defendants. As a result Plaintiff has satisfied the "exhaustion of administrative remedies" as required by PLRA. See *Taylor v. Barrett* 105 Supp 2d 483. The PLRA requires exhaustion only of those administrative remedies "as are available," the PLRA does not require exhaustion when circumstances render administrative remedies "effectively unavailable" *Nunez*, 591 F.3d at 1223-26 (holding that *Nunez's failure to timely exhaust his administrative remedies was excused because he took reasonable and appropriate steps to exhaust claims and was precluded from exhausting not through his own fault but by the warden's mistake*) *Sapp*, 623 F.3d at 822-23

Respectfully submitted:



Frank Prillerman

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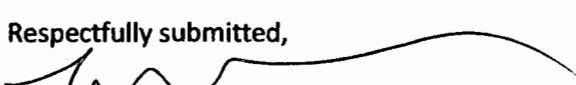
CERTIFICATE OF SERVICE

I, Franklyn Prillerman, do hereby certify that on this date a correct copy of Plaintiff's Response to Affirmative Defenses was sent via first class mail to:

Kristen Davis  
City of Philadelphia Law Department  
Civil Rights Unit  
1515 Arch St, 14<sup>th</sup> fl  
Philadelphia, PA 19102

Date: February 4, 2016

Respectfully submitted,

  
/s/ Franklyn D. Prillerman

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Philadelphia, PA 19144